

Spain follows up on the European Commission Regulation on Coordination of Foreign Investment with its own Foreign Investment Screening Regulation.

1. EU Regulation 2019/452 on a framework for the screening of foreign direct investments.

Earlier this year, the EU adopted Regulation (EU) 2019/452 of 19 March (**Regulation**), establishing a framework for the screening of foreign direct investments (**FDI**) into the EU. The Regulation, dealing with FDI which may affect *security or public order*, came into force on 19 April 2019 and will be applicable from 11 October 2020. Amongst other things, the Regulation:

- (i) creates a cooperation mechanism whereby Member States and the European Commission are able to exchange information and raise concerns related to specific investments;
- (ii) empowers the European Commission to issue opinions when an investment poses a threat to the security or public order of more than one Member State, or when an investment might undermine a project or program of EU interest (*e.g.*, Horizon 2020, Galileo);
- (iii) encourages cooperation between Member States on investment screening, best practices and information exchange on issues of common interest;
- (iv) sets requirements for Member States who wish to maintain or adopt a screening mechanism at national level.

The Regulation represents the EU's first attempt at coordinating Member State security reviews¹ at a time of growing protectionism worldwide. However, as indicated, the Regulation does not give the European Commission or any other European institution the power to suspend or block FDI (the European Commission may only issue non-binding opinions on given types of FDI), a power reserved to Member States. Likewise, the Regulation does not require Member States to introduce or implement FDI screening mechanisms at national level; however, it does set some minimum standards for Member States deciding to regulate the matter.

The Regulation focuses on FDI likely to affect security or public order, such as (i) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, sensitive facilities and investments in land and real estate; (ii) critical technologies and dual-use (*e.g.*, artificial intelligence, robotics, semiconductors, cybersecurity, quantum technology, aerospace, defense, energy storage, nuclear technologies, nanotechnologies and biotechnologies); (iii) supply of critical inputs, including energy or raw materials, as well as food security; (iv) access to sensitive information, including personal data or the ability to control such information; and (v) freedom and pluralism of the media.

The Regulation adds an additional requirement to many mergers and acquisitions in the EU. Even though, as stated, the European Commission as such does not enjoy any powers of veto in connection with concentrations, the Regulation has potential to complicate foreign investment screening by enabling a system of communications and commentary between authorities and the European Commission; moreover, as illustrated by the example of Spain (see below), the Regulation has, in practice, triggered new regulatory initiatives at the national level.

2. Draft Regulation on FDI in Spain.

The Ministry of Industry has issued a draft regulation (**Draft Regulation**), which will supersede the existing regulation (mostly limited to statistical purposes regarding foreign investment) and which seeks consistency with the EU regime preconized by the Regulation. The new communication and authorization powers can be segmented in the following categories:

- (a) Perhaps most noteworthy is the possibility that the Government reserves itself to derogate from the general regime of freedom of investment (and therefore subject acquisitions to administrative authorization) in connection with FDI in companies or assets involved or related to the exercise of public authority or activities related to public order, security or public health.

The administrative authorization granted by the Government can contain conditions aimed at preserving security such as (i) maintenance [in Spanish territory] of industrial or R&D activities and capabilities; (ii)

¹ Our understanding is that at least 13 out of 28 Member States have FDI screening mechanisms in place, differing widely in scope: Austria, Denmark, Germany, Hungary, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain and United Kingdom.

integrity and security of infrastructures; (iii) restrictions of access to technology or data by the investor; (iv) assignment of activities or businesses carried out in Spanish territory; (v) restrictions on voting rights by non-EU investors; (vi) granting of special voting rights or observation rights to State entities present in the target company; (vii) financial bonds or deposits aimed at guaranteeing the obligations ordered by the Government.

- (b) In connection with national defence, including the industrial capabilities and areas of knowledge required for the procurement of the armed forces and those destined to the design and production of weapons and weapons systems; and in connection with civil explosives, the freedom of investment is suspended and subject to administrative authorization. Acquisitions of stakeholdings below 5% or those below 10% (provided in the latter case that the investor formally undertakes not to use any voting rights) are exempted.
- (c) Finally, The Draft Regulation contains a system of communication by foreign (non-EU) investors, applicable to FDI in:
- Critical infrastructures;
 - Information systems and digital networks;
 - Dual-use products;
 - Private security activities;
 - Gaming activities;
 - Activities that are, or may be linked to, the financing of terrorism.

Investors seeking to carry out an acquisition in those areas can be asked to provide information; and transactions can be referred to the Council of Ministers, who has the power to condition the specific investment to administrative authorization.

The Draft Regulation contains an anti-avoidance provision to tackle indirect investment structures; and it is without prejudice to investment and ownership restrictions on investments already in force in regulated industries such as energy, infrastructures, transportation, telecoms, media, water, health, raw materials and mining, financial system, amongst others.

The Draft Regulation has, therefore, potentially far-reaching implications. It is not yet known when precisely the Draft Regulation will become binding.

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